OMAR SUHAIMI ABU HASSAN A

v.

MAHKAMAH PERUSAHAAN MALAYSIA & ANOR

COURT OF APPEAL, PUTRAJAYA B
AZIAH ALI JCA
MOHTARUDIN BAKI JCA
HAMID SULTAN ABU BACKER JCA
[CIVIL APPEAL NO: W-01-(IM)66-02-2013]
21 FEBRUARY 2014 C

CIVIL PROCEDURE: *Judicial review - Application for leave - Failure to include phrase "ex parte" and "leave" in originating application - Whether fatal - Subsequent application to amend judicial review application which had been fixed for full hearing - Insertion of word "leave to be granted" - Whether an attempt to convert full hearing as leave application - Whether requirement for leave application mandatory - Whether amendment allowed - Rules of Court 2012, O. 53 rr. 3(2), 3(6) & 3(7)* D

WORDS & PHRASES: *'statement' - Rules of Court 2012, O. 53 r. 7 - Meaning of - Judicial review application - Amendment to originating application - Whether O. 53 r. 7 specifically provides for amendment of 'statement'* E

The appellant had filed an application for judicial review in the High Court and the pertinent issue in contention was that the appellant had failed to include the phrase "*ex parte*" as well as "leave" in the originating application. Hence, it was contended that the appellant's leave for judicial review was not obtained. It was further argued that the subsequent application by the appellant to amend the judicial review application which had been fixed for full hearing by inserting the word "leave to be granted" was an afterthought and an attempt to convert the full hearing as a leave application, resulting in an abuse of process of the court. In the High Court, the learned judge ruled that the judicial review application itself could not be amended and only the "statement" as provided under O. 53 r. 3(2) of the Rules of Court 2012 ('ROC') could be amended pursuant to O. 53 r. 7(1). Dissatisfied, the appellant appealed to this court. F G H I

Held (dismissing appeal with costs)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) The originating application did not carry the phrase "*ex parte* application" notwithstanding that the omission could be condoned. However, this will reflect that the solicitor had failed to appreciate the clear provision of O. 53 r. 3(2) of the ROC which appears to be mandatory and requires a leave application to be made "*ex parte*" in chambers. (para 6)

(2) Form 109 is the originating process as reflected by O. 53 r. 2(1) of the ROC which, read together with O. 53 r. 3(1) and (2), is to be made *ex parte* to a judge in chambers. Once leave is obtained, the hearing of the substantive prayer can proceed upon filing of Form 110 together with Form 109 as well as all affidavits and the mandatory statement served on the relevant parties. On the facts, the appellant had not satisfied O. 53 r. 3(2) and had not filed the relevant forms according to the rule of procedure and/or practice and had also failed to make any application promptly to condone inadvertence and/or non compliance. (para 12)

(3) The originating application or any application, pleadings, writ or originating process can be amended on good grounds, or as provided by the Rules. Order 53 r. 7 of the ROC specifically provides for amendment of "statement" and the "statement" in a judicial review application will not fall within the meaning of originating process or application or pleadings. Failing to seek a prayer for leave in the originating application in the nature of Form 109 will be fatal unless the applicant had filed an application to amend the originating process for inadvertence within the three months (or extended) period specified in O. 53 r. 3(6) or for some special or exceptional reason the court is prepared to invoke O. 53 r. 3(7). (para 11)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah memfailkan permohonan untuk semakan kehakiman di Mahkamah Tinggi dan isu yang dipertikaikan adalah bahawa perayu telah gagal untuk memasukkan perkataan "*ex parte*" dan "kebenaran" dalam permohonan pemula. Oleh itu, adalah dihujahkan bahawa kebenaran untuk semakan kehakiman tidak diperolehi oleh perayu. Juga dihujahkan bahawa permohonan seterusnya oleh perayu untuk meminda permohonan semakan

kehakiman yang telah pun ditetapkan untuk pendengaran dengan menambah perkataan "diberikan kebenaran" adalah suatu fikiran kemudian dan cubaan untuk menukar pendengaran penuh sebagai permohonan kebenaran, menyebabkan suatu penyalahgunaan proses mahkamah. Di Mahkamah Tinggi, yang arif hakim memutuskan bahawa permohonan semakan kehakiman tidak boleh dipinda dan hanya "pernyataan" seperti yang diperuntukkan di bawah A. 53 k. 3(2) Kaedah-Kaedah Mahkamah 2012 ('KM') boleh dipinda berikutan A. 53 k. 7(1). Tidak berpuashati, perayu merayu ke mahkamah ini.

Diputuskan (menolak rayuan dengan kos)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Permohonan pemula tidak mengandungi perkataan "permohonan *ex parte*" walaupun ketinggalannya boleh dibiarkan. Walau bagaimanapun, ini menunjukkan bahawa peguam telah gagal untuk menghargai peruntukan jelas A. 53 k. 3(1) KM yang adalah mandatori dan memerlukan permohonan kebenaran untuk dibuat secara "*ex parte*" dalam kamar.

(2) Borang 109 adalah proses pemula seperti digambarkan oleh A. 53 k. 2(1) KM di mana, apabila dibaca bersama A. 53 k. 3(1) dan (2), dibuat secara *ex parte* kepada hakim dalam kamar. Setelah kebenaran diperolehi, pendengaran permohonan substantif boleh diteruskan apabila Borang 110 difailkan dengan Borang 109 bersama-sama dengan kesemua afidavit dan kenyataan mandatori yang telah diserahkan kepada pihak-pihak berkenaan. Berdasarkan fakta, perayu tidak mematuhi A. 53 k. 3(2) dan tidak memfailkan borang-borang berkenaan berikutan kaedah prosedur dan/atau amalan dan juga gagal membuat sebarang permohonan dengan segera menyebabkan kelalaian dan/atau ketidakpatuhan.

(3) Permohonan pemula atau pun sebarang permohonan, pliding, writ atau proses pemula boleh dipinda dengan alasan baik, atau seperti diperuntukkan oleh Kaedah-Kaedah. Aturan 53 k. 7 KM memperuntukkan secara khusus bagi pindaan "pernyataan" dan "pernyataan" dalam permohonan semakan kehakiman tidak terangkum dalam maksud proses pemula atau permohonan atau pun pliding. Kegagalan untuk memohon kebenaran dalam permohonan pemula melalui Borang 109 adalah menjejaskan kecuali jika pemohon telah memfailkan permohonan untuk

A meminda proses pemula disebabkan ketidaksengajaan dalam tempoh tiga bulan (atau dilanjutkan) seperti yang dinyatakan di bawah A. 53 k. 3(6) atau pun untuk sebarang alasan khas atau munasabah di mana mahkamah boleh membangkitkan A. 53 k. 7.

B **Case(s) referred to:**

Ab Ghani Ab Rahman lwn. Yang Di Pertua Majlis Daerah Alor Gajah [2009] 1 LNS 598 HC ***(refd)***

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

C *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 SC* ***(refd)***

Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor [1997] 4 CLJ 725 HC ***(refd)***

National Union of Bank Employees v. Director General of Trade Unions & Anor [2013] 7 CLJ 957 FC ***(refd)***

D *Nik Noorhafizi Nik Ibrahim & Ors v. PP [2014] 2 CLJ 273 CA* ***(refd)***

O'Reilly v. Mackman [1982] 3 All ER 1124 HL ***(refd)***

Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***

Yick Hoe Ferrous Steel Sdn Bhd v. Tribunal Rayuan Kastam & Ors [2011] 7 CLJ 544 HC ***(refd)***

E **Legislation referred to:**

Rules of Court 2012, O. 1A, O. 53 rr. 2(1), 3(1), (2), (6), 7(1)

For the appellant - Mohd Shahril Daud; M/s Ainul Azam & Co

F *For the respondent - Maisarah Juhari (Aida Adha Abu Bakar with her); SFC*
Teoh Alvare (Muhammad Fareez Shah Zainal Aberdin with him); M/s Zul Rafique & Partners

G *[Appeal from High Court, Kuala Lumpur; Judicial Review No: 25-236-12-2012]*

Reported by Kumitha Abd Majid

H

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant's appeal in respect of dismissal of the judicial review application on the preliminary objection of the Attorney General that leave for judicial review was not obtained came up for hearing on 5 December 2013 and upon hearing the submission

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the judgment was reserved to 14 February 2014. My learned sister Aziah Ali JCA and my learned brother Mohtarudin Baki JCA have read the draft judgment and approved the same. This is our judgment.

Brief Facts

[2] The applicant has filed an application for judicial review against the decision of the Industrial Court. The central issue before us was that the appellant did not obtain leave as required by O. 53 r. 3(1) of the Rules of Court 2012 which states:

> 3. (1) An application under this Order shall not be made unless leave therefore has been granted in accordance with this rule.

[3] The learned Federal Counsel says the subsequent application by the appellant to amend the judicial review application which has been fixed for full hearing by inserting the word 'leave to be granted' is an afterthought and is an attempt to convert the full hearing of the judicial review application as leave application. And in consequence an abuse of process of court.

[4] For purpose of clarity we set out some part of the original application and the amendment sought.

Original Application

> AMBIL PERHATIAN bahawa mahkamah akan diusulkan pada ... haribulan ... , 2012 pukul 9.00 pagi atau seberapa cepat selepas itu yang boleh didengar oleh peguam bagi Omar Suhaimi bin Abu Hassan, iaitu Pemohon yang dinamakan di atas untuk relif-relif berikut:
>
> (i) Suatu Perintah untuk Semakan Kehakiman diberikan bagi membatalkan keputusan Mahkamah Perusahaan iaitu Responden Pertama yang telah memberikan keputusannya melalui Award Mahkamah Perusahaan No. 1087 Tahun 2012 yang memutuskan bahawa Tuntutan Pemohon ditolak dan pemohon telah berhenti kerja secara rela dan dengan demikian tiada pembuangan kerja.
>
> (ii) Suatu perintah Mandamus diarahkan kepada Mahkamah Perusahaan, Malaysia untuk mendengar semula kes No. 13/4-69/2010 oleh bahagian lain Mahkamah Perusahaan atau oleh Pengerusi Mahkamah Perusahaan yang lain.

(iii) Sebarang relif lanjut dan/atau lain-lain relif sebagaimana yang difikirkan suai manfaat oleh Mahkamah yang Mulia ini; dan

(iv) Kos permohonan ini dan beriringan dengan permohonan ini adalah kos dalam kausa.

Amendment sought

AMBIL PERHATIAN bahawa Mahkamah akan diusulkan pada 27 November 2012, pukul 9.00 pagi atau seberapa cepat selepas itu yang boleh didengar oleh peguam bagi Omar Suhaimi bin Abu Hassan, iaitu Pemohon yang dinamakan di atas untuk relif-relif berikut:

(i) **Pemohon diberikan kebenaran untuk memfailkan suatu permohonan untuk** Suatu Perintah untuk Semakan Kehakiman diberikan bagi membatalkan keputusan Mahkamah Perusahaan iaitu Responden Pertama yang telah memberikan keputusan melalui Award Mahkamah Perusahaan No: 1087 Tahun 2012 bertarikh 09.08.2012 yang memutuskan bahawa Pemohon telah berhenti kerja secara rela dan dengan demikian tiada pembuangan kerja.

(ii) **Pemohon diberikan kebenaran untuk memfailkan suatu permohonan untuk** Suatu Perintah *Mandamus* diarahkan kepada Mahkamah Perusahaan, Malaysia untuk mendengar semula kes No: 13/4-69/2010 oleh bahagian lain Mahkamah Perusahaan atau oleh Pengerusi Mahkamah Perusahaan yang lain.

(iii) Sebarang relif lanjut dan/atau lain-lain relif sebagaimana yang difikirkan suai manfaat oleh Mahkamah yang Mulia ini; dan

(iv) Kos permohonan ini dan beriringan dengan permohonan ini adalah kos dalam kausa.

It must be noted what was left out was the underlined part and it could have been sorted out by an oral application to amend with an undertaking if leave is granted the appellant will file Form 110. As in the instant case the appellant had filed the originating application within time. As the appellant's solicitor was less than frank in seeking the adjournment, the problem has been compounded. In consequence the objections had to be dealt with according to law.

[5] As a general rule, courts are minded to condone non-compliance in judicial review application provided the application is filed within time and also when it relates to constitutional

challenges. These are reflected in a number of decisions. For example, the Federal Court in *National Union of Bank Employees v. Director General of Trade Unions & Anor* [2013] 7 CLJ 957; [2013] 6 MLJ 16 condoned a 42 days delay in filing notice of hearing in Form 111B (now Form 110) which was required to be filed within 14 days upon obtaining leave. However, when it relates to filing an application for judicial review out of time, a stricter approach is taken by the courts where the challenge is purely related to administrative law challenges related to executive action and/or decision of tribunal as reflected in the decision of the Federal Court in *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2013] 3 MLJ 145 where the decision of *O'Reilly v. Mackman* [1982] 3 All ER 1124 HL, was approved. When it relates to constitutional challenges by way of writ or judicial review or even arising from criminal cases, time factor is not an issue and *O'Reilly*'s principles do not apply. This is reflected in a number of cases. (See *Nik Noorhafizi Nik Ibrahim & Ors v. PP* [2014] 2 CLJ 273; [2013] 6 MLJ 660). The reason was well articulated in the case of *Life Insurance Corporation of India v. Escorts Ltd & Ors* AIR 1986 SC 1370 by the Indian Supreme Court when dealing with *O'Reilly*'s case held as follows:

> We also desire to warn ourselves against readily referring to English cases on questions of Constitutional law, Administrative Law and Public Law as the law in India in these branches has forged ahead of the law in England, guided as we are by our Constitution and uninhibited as we are by the technical rules which have hampered the development of the English law.

[6] This case does not involve any constitutional issues. What is important to note in this case is that the originating application does not carry the phrase '*ex parte* application' notwithstanding the omission can be condoned. However, in the instant case this will reflect that the solicitor has failed to appreciate the clear provision of O. 53 r. 3(2) of the Rules of Court 2012 which appears to be mandatory and requires a leave application to be made '*ex parte*' in chambers, though in practice leave application is usually decided in the open court. The said order reads as follows:

> An application for leave must be made *ex parte* to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

[7] On the day of the hearing of the originating application and upon the objection of the learned Federal Counsel the appellant's solicitor requested an adjournment to reply to the application for amendment to the originating application. This also reflects that the solicitor's request for adjournment was not genuine and was meant to mislead the court for an adjournment.

[8] The learned trial judge did not allow the amendment to the originating application for judicial review on the ground the Attorney General's Chambers had objected to the amendment based on the fact that the application was not filed after obtaining leave and if the amendment was allowed it would tantamount to regularising the proceedings for which leave was not obtained.

[9] The learned trial judge in her judgment also went on to say that the judicial review application itself cannot be amended and had asserted quite erroneously that in a Judicial Review application only the 'statement' stated in O. 53 r. 3(2) of the Rules of Court 2012 can be amended pursuant to O. 53 r. 7(1) of the Rules of Court 2012 which reads as follows:

> 7. (1) The Judge may allow the statement to be amended, and may allow further affidavits to be used if they deal with new matters arising out of any affidavit of any other party to the application, and where the applicant intends to amend his statement or use further affidavits, he must immediately give notice of his intention and of any proposed amendment of his statement to every other party.

[10] That part of the judgment reads as follows:

> Setelah gagal untuk mematuhi A53 k3 dan setelah dibantah oleh Peguam Negara Malaysia, kini pemohon memohon untuk meminda Lampiran 1. Saya perhatikan A53 tidak mempunyai peruntukan untuk pindaan sedekian. Kaedah (7) nya hanya membenarkan pindaan dibuat kepada pernyataan.

[11] We have read the appeal record and the submission of the parties in detail. We are grateful to learned counsel and learned Federal Counsel for the comprehensive submission. After much consideration to the submission of learned counsel for the appellant, we take the view the appeal must be dismissed. Our reasons *inter alia* are as follows:

(i) Approaching the court for judicial review is a two stage process. The first stage (consisting of two parts) is by seeking leave and it must be done by *ex parte* application which in practice would also stand as the originating application for the judicial review. This originating application is required by the Rules to be made in Form 109 (previously Form 111A). Form 109 is precedent based on originating motion for prerogative orders [see *O'Reilly v. Mackman* [1982] 3 All ER 1124 HL]. In practice this originating application will also have a prayer for leave and will stand as the originating process itself and must be served not later than three days from the date of hearing of the *ex parte* application to the Attorney General's Chambers. The court will hear the originating application in two parts. First by granting leave and subsequently by fixing a hearing date for the hearing of the main prayers. Notice of hearing of the main prayers is given by filing Form 110 and serving it with relevant papers as stated in the Form itself. Strictly speaking leave process under O. 53 r. 3(2) of the Rules of Court 2012 will appear that it must first be initiated by originating summons and upon obtaining leave Form 109 must be filed and thereafter Form 110. This mode which is cumbersome and repetitive is generally not followed in practice. The said Form 109 which does not state '*ex parte*' or 'leave' reads as follows:

No. 109

APPLICATION FOR JUDICIAL REVIEW (O. 53, r. 2)

IN THE HIGH COURT IN ... AT ...

APPLICATION FOR JUDICIAL REVIEW NO: ...

In the matter of ...

Between

AB ... Applicant

and

CD ... Respondent

Take Notice that the Court will be moved on ... , the ... day of ... , 20 ... , by the ...

A Applicant abovenamed for the following relief:

(Here state the relief claimed)

The grounds in support of this application are those appearing in the Statement filed herewith.

B

The affidavit of ... , Affirmed on the ... day of ... , 20 ... , and filed herein shall be read in support of this application.

Dated the ... day of ... , 20 ...

C (Seal)

...

Registrar

D In the instant case the originating application was not done according to the rules of court. That is to say the underlined words, as above, to seek prayer for leave was not typed in.

(ii) The second stage is to give notice of hearing of the originating process (which had the prayer for leave and was granted) and E that has to be done in Form 110 which reads as follows:

No. 110

NOTICE OF HEARING OF APPLICATION FOR JUDICIAL REVIEW (O. 53, r. 4)

F

IN THE HIGH COURT IN ... AT ...

APPLICATION FOR JUDICIAL REVIEW NO: ...

In the matter of ...

G

Between

AB ... Applicant

And

H

CD ... Respondent

Take Notice that leave to apply for judicial review having been granted on the ... day of ... , 20 ... , the substantive application for the relief sought herein shall be heard in open court on ... , I the ... day of ... , 20 ... , at 9 a.m. or so soon thereafter as counsel may be heard.

And further take notice that a copy of the statement and all affidavits in support are herewith served upon you.

To: (1) The respondent abovenamed.

(2) All other parties upon whom service has been directed.

Dated the ... day of ... , 20 ...

Seal

...

Registrar

In the instant case this was also not done and the amendment sought will not satisfy the requirement of Form 110. In essence, even if the amendment is allowed, Form 110 will not be there and that form had to be filed before the hearing proper of the originating process, unless the court wants to condone the non-compliance. (see *National Union of Bank Employees v. Director General of Trade Unions & Anor* [2013] 7 CLJ 957; [2013] 6 MLJ 16)

(iii) Learned counsel for the appellant argued before us that the originating application can be amended to include the phrase '*ex parte*' as well as 'leave', and the learned judge was wrong to assert that only in a judicial review application the 'statement' can be amended. We agree with learned counsel that the originating application or any application, pleadings, writ or originating process can be amended before the court on good grounds, or as provided by the rules. What is not allowed to be amended is affidavit, statutory declarations, *etc*; and these documents are usually done by corrective affidavit or corrective statutory declaration. The 'statement' in judicial review application will not fall within the meaning of originating process or application or pleadings and in consequence O. 53 r. 7 of the Rules of Court 2012 specifically provides for amendment of 'statement'.

(iv) The learned Senior Federal Counsel vehemently argues that the amendment sought is not *bona fide* and is an attempt to defeat the provision of O. 53 r. 3(1) of the Rules of Court 2012 which is a mandatory requirement to initiate judicial proceeding and such non-compliance cannot be cured by O. 1A of the Rules of Court 2012 which reads as follows:

> In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.

And relies on a number of cases to drive home the point namely: (i) *Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor* [1997] 4 CLJ 725; [1998] 1 MLJ 224; (ii) *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33; (iii) *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927; (iv) *Ab Ghani Ab Rahman lwn. Yang Di Pertua Majlis Daerah Alor Gajah* [2009] 1 LNS 598; [2009] MLJU 540 .

(v) In *Yick Hoe Ferrous Steel Sdn Bhd v. Tribunal Rayuan Kastam & Ors* [2011] 7 CLJ 544, Aziah Ali J (as Her Ladyship then was) had meticulously gone through most of the authorities and on the facts of the case had rightly held:

> (a) Order 53 RHC imposed stringent conditions or rules. Failure to comply with the clear provisions of O. 53 RHC was a fundamental defect that was not curable under O. 1A RHC. By commencing this action by way of originating motion, the applicant was evading the mandatory requirements of O. 53 RHC in particular the requirement to first obtain leave. (para 14)
>
> (b) The only reference to an application for leave was in the intitulement. The purpose of the intitulement was to give notice to the other party of the nature of the relief sought in order to avoid the opponent being taken by surprise. However it was not a substitute for a proper pleading for leave. This was to be incorporated in the body of the application itself. (para 16)
>
> (c) The application for judicial review without first obtaining leave was defective, grossly irregular and an abuse of process. The failure to obtain leave resulted in the court lacking jurisdiction to hear the application for judicial review. (para 17)

(vi) In our view failing to seek a prayer for leave in the originating application in the nature of Form 109 will be fatal unless the applicant has filed an application to amend the originating process for inadvertence within the three months (or extended)

period specified in O. 53 r. 3(6) of the Rules of Court 2012 or for some special or exceptional reason the court is prepared to invoke O. 53 r. 3(7) which reads as follows:

> The Court may, upon an application, extend the time specified in rule 3(6) and if it considers that there is a good reason for doing so.

[12] In the instant case Form 109 is the originating process as reflected by O. 53 r. 2(1) of the Rules of Court 2012 which, read together with O. 53 r. 3(1) and (2) of the Rules of Court 2012, is to be made *ex parte* to a judge in chambers. Once leave is obtained then the hearing of the substantive prayer can proceed upon filing of Form 110 with the Form 109 as well as all affidavits and the mandatory 'statement' served on the relevant parties, as set out in the rules. The appellant here had not satisfied O. 53 r. 3(2) and had not filed the relevant forms according to rule of procedure and/or practice and has also failed to make any application promptly to condone inadvertence and/or non-compliance.

[13] For reasons stated above the appeal is dismissed with costs. Deposit to be refunded. The appellant to pay RM5,000 to the respondent as costs here and below.

[14] We hereby order so.